Re Bar Council of Malaysia

HIGH COURT (KUALA LUMPUR) - ORIGINATING SUMMONS NO 17-39-89
EUSOFF CHIN J
12 SEPTEMBER 1989

Legal Profession - Chambering pupil - Extent of appearance in court during pupillage - Interpretation of s 36(2)(b) of the Legal Profession Act 1976

In this application, the Bar Council seeks the determination of the construction of s 36(2)(b) of the Legal Profession Act 1976. The question involved is as follows:

Whether upon the true construction of s 36(2)(b) of the Legal Profession Act 1976, a chambering student at the expiration of the first three months of his pupillage is only entitled to:

(i) appear in chambers whether it is before a judge or registrar of the High Court, president of the sessions court or magistrate in order to conduct any cause or matter;
(ii) appear in chambers before a judge or registrar of the High Court and in open court or chambers when appearing before a president of the sessions court or a magistrate in order to conduct any cause or matter; or
(iii) any other construction the court deems fit.

Held, determining the construction of the section in the following manner:

(1) The purpose of s 36(2) of the Act is to provide a step by step practical training for a chambering pupil as stressed by Mustapha J.

(2) The court interprets s 36(2)(b) to mean that, at the expiration of the said period of three months, a pupil may appear to conduct any cause or matter (i) in chambers in the High Court; (ii) in chambers in the sessions court and in the magistrates' court; and (iii) in open court before any magistrate.

(3) The practice of the sessions court hearing chamber matters in open court is a matter of convenience. Some sessions court judges' office rooms are too small, and most probably their office tables too are not large enough to accommodate three or four learned counsel around it, and there are times when the parties request to be present to hear their learned counsel's arguments in chambers. Under such circumstances, it is quite proper for the sessions court judges to hear chamber matters in open court rooms, provided that they clear members of the public from these rooms. A chambering pupil under s 36(2)(b) of the Act may appear before any sessions court judge to conduct any cause or matter which is a chamber matter on behalf of his master.

Case referred to
1 *Felix* v *Thomas* [1967] 1 AC 292 (refd)

Legislation referred to
Legal Profession Act 1976 s 36(2)(a), (b)

Cur Adv Vult

Eusoff Chin J: This originating summons was filed by the Bar Council seeking determination of the court on the following questions of law:

1 Whether upon the true construction of s 36(2)(a) of the Legal Profession Act 1976, a chambering student during the first three months of his pupillage is only entitled to:

(i) appear in chambers whether it be before a judge or registrar of the High Court, president of the sessions court or magistrate and only
  (a) to mention a case;
  (b) to enter judgment in default;
  (c) to apply for bail;
  (d) to take a consent judgment or order;
(ii) appear in chambers before a judge or registrar of the High Court and in open court or chambers when appearing before a president of the sessions court or magistrate and only
  (a) to mention a case;
  (b) to enter judgment in default;
  (c) to apply for bail;
  (d) to take a consent judgment or order; or
(iii) any other construction the court deems fit.

2 Whether upon the true construction of s 36(2)(b) of the Legal Profession Act 1976, a chambering student at the expiration of the first three months of his pupillage is only entitled to:

(i) appear in chambers whether it is before a judge or registrar of the High Court, president of the sessions court or magistrate in order to conduct any cause or matter;
(ii) appear in chambers before a judge or registrar of the High Court and in open court or chambers when appearing before a president of the sessions court or a magistrate in order to conduct any cause or matter; or
(iii) any other construction the court deems fit.

On 5 September 1989 Encik Cecil Abraham appeared before me, and submitted that there is no ambiguity on the construction of s 36(2)(a) of the Legal Profession Act 1976 ('the Act') but he would proceed with the application on the determination of the meaning of s 36(2)(b). He produced the judgment of the High Court of Seremban in Civil Appeal No 12-1-88. The relevant part of the judgment of Mustapha J states:

> The first part of the order made under s 36(2) is clear, the pupil for the first three months can appear on behalf of his master or master's firm in the chambers of the High Court, sessions court and magistrate's court to mention a case, enter judgment in default, apply for bail and take consent judgment - all in chambers. This is very clear.
>
> And after three months of obtaining the order under s 36(2) of the Legal Profession Act 1976, the pupil can appear
>
> 'in chambers in the High Court and in the subordinate courts and before any magistrate, to conduct any cause or matter.'
>
> on behalf of his master or his master's firm.
>
> Applying the ejusdem generis rule the word 'chambers' is the genus mentioned for the High Court and therefore the same

genus should be followed on to the next category, ie the subordinate courts and the rest.

And again applying the common sense approach, the pupil who is attending and receiving instructions in law at his master's chambers, surely is not qualified and has the capacity of conducting a contentious case on his own. He is still not a full-fledged lawyer. He has not yet been robed. He may have a double first at Corpus Christi but until he has fully complied with all the conditions and requirements of the Legal Profession Act 1976 and until he is admitted to the Bar he is not qualified to be a legal practitioner.

To hold otherwise would be to permit pupils while reading in chambers to appear and defend such serious cases like manslaughter, breach of trust involving millions of dollars or risk the liberty and the skin of the rump of an alleged rapist.

Common sense tells us of the inherent danger of an unrobed and 'unlicensed' law graduate, while still attending and receiving instructions in the law, (which means still learning the law or as some would say learning the ropes) to appear and defend these cases involving the liberty and pain and lacerations of the buttocks of accused persons in the courts.

The legislature has thought fit to provide a gradual step by step approach for law graduates; before they can go on their own to practise, they have to read in the chambers of their master. Then after a certain period, to appear in chambers of the High Court and subordinate courts to mention, enter judgment in default or apply for bail, and after three months of doing so, to appear in chambers of the High Court and subordinate courts to argue cases - a sane, reasonable and realistic step by step approach.

Mustapha J in that case was dealing with an appeal in which judgment was entered in open court by the sessions court when the defendant was absent, and a chambering pupil representing the absent defendant was present in open court when the default judgment was entered. The learned judge held that a chambering pupil could not, under s 36(2)(b), appear in open court in the sessions court to conduct the case, and therefore judgment was rightly entered against the defendant.

Apparently, the Bar Council is doubtful if the view held by the High Court of Seremban on the interpretation of s 36(2)(b) is correct. Hence this application.

Section 36(2) of the Act states:

A Judge may, upon application made in chambers by a Master at the commencement of the pupillage of the Master's pupil, make an order that the pupil be permitted to appear on behalf of the Master or of the firm in which the Master is practising

(a) during the period of three months from the date of the order
  (i) before a Judge or a Registrar of the High Court, in Chambers;
  (ii) before a President of the Sessions Court or a Magistrate, in Chambers;
  (iii) before a Registrar of the Subordinate Courts,

to mention a case, including entering judgment in default, or to apply for bail or to take a consent judgment or order; and

(b) at the expiration of the said period of three months in chambers in the High Court and in the Subordinate Courts and before any Magistrate, to conduct any cause or matter.

I agree that the purpose of s 36(2) of the Act is to provide a step by step practical training for a chambering pupil as stressed by Mustapha J.

The affidavit of Encik Manjeet Singh Dhillon, the honorary secretary of the Bar Council, says that the Legal Profession Committee of the Bar Council is of the view that s 36(2)(b) should be interpreted to mean:

On the expiration of the period of three months, the pupil may appear
(i) in chambers in the High Court;
(ii) in chambers in the subordinate court and before any magistrate;
to conduct any cause or matter.

Encik Cecil Abraham for the Bar Council submitted that the view expressed by the Legal Profession Committee might have been given following the judgment of the High Court at Seremban. He submitted that s 36(2)(b) is capable of more than one interpretation. This subsection can also be interpreted to mean that a chambering pupil may appear in open court in the subordinate courts.

I think the ambiguity arises because when one reads para (b) of s 36(2) he either pauses (ie puts an imaginary comma) after the words 'High Court' or 'subordinate courts'. If he pauses after the words 'High Court' it would give the meaning that as regards the High Court the pupil may appear only in chambers to conduct any cause or matter; and he is at liberty to appear in chambers and in open court in the subordinate courts or before any magistrate. The words 'subordinate courts', however, include both the sessions courts and the magistrates' courts. If that interpretation is accepted it would appear that the words 'and before any magistrate' in s 36(2)(b) are redundant, being superfluous. But this cannot be the case because a word in a section of a statute cannot be simply ignored. A construction which would leave without effect any part of the language of a statute will normally be rejected - *Felix* v *Thomas*.[1]

Bearing in mind that Parliament does not legislate in futility and that every word in s 36(2)(b) of the Act should be given effect, I would read this subsection by pausing after the words 'subordinate courts'. By doing so, the words 'in chambers' would apply to both 'the High Court' and 'the subordinate courts'. I therefore interpret this subsection to mean:

That at the expiration of the said period of three months, a pupil may appear to conduct any cause or matter
(i) in chambers in the High Court;
(ii) in chambers in the sessions courts and in the magistrates' courts; and
(iii) in open court before any magistrate.

Therefore, at the expiration of three months, a chambering pupil may progress and gain further experience by being allowed to appear and conduct a cause or matter on behalf of his master or of the firm in which his master is practising, before a judge or a registrar of the High Court in chambers; before a judge of the sessions court in chambers; and before a magistrate in chambers and in open court.

Section 36(2) of the Act should be read subject to s 36(5) of the Act which states:

> The Master of the pupil, the Bar Council or the State Bar Committee may apply at any time during the pupillage of any pupil to any Judge in chambers for a variation or rescission of the order referred to in subsection (2) and the Judge shall make such order on such application as in all the circumstances seems to be in the best interest of the profession.

Paragraph 7 of the affidavit of Encik Manjeet Singh Dhillon also states:

> However, I verily believe that currently proceedings in the subordinate courts are almost entirely conducted in open court and hence, any reference to a chambering student appearing in 'chambers' in a subordinate court may seem to appear superfluous.

The practice of the sessions court hearing chamber matters in the open court is a matter of convenience. Some sessions court judges' office rooms are too small, and most probably their office tables too are not large enough to accommodate three or four learned counsel around it, and there are times when the parties request to be present to hear their learned counsel's arguments in chambers. Under such circumstances, it is quite proper for the sessions court judges to hear chamber matters in open court rooms, provided that they clear members of the public from these rooms. Chambering pupils under s 36(2)(b) of the Act may appear there before any sessions court judge to conduct any cause or matter which is a chamber matter on behalf of their masters.

Order accordingly.

Solicitors: *Shearn Delamore & Co.*

Reported by *Wong Kim Fatt*

Tan Sew Yok v Ng Keng Huat

HIGH COURT (JOHORE BAHRU) - DIVORCE PETITION NO 47-150 OF 1987
ABU MANSOR J
11 SEPTEMBER 1989

Family Law - Custody of child - Interim application pending divorce - Maintenance - Injunction against assault - Parties cross-examined on affidavit evidence - Welfare principles paramount consideration in deciding custody - Law Reform (Marriage and Divorce) Act 1976, ss 77(1)(a) & 93(1)(d)

The petitioner was lawfully married to the respondent and lived in Pontian, Johore. On 18 July 1978 the petitioner gave birth to their first and only child who was about ten years old at the time of the hearing of this application made by the petitioner. One month after the birth of the child the petitioner left the matrimonial home together with the child and lived separately from the respondent at the house of the petitioner's parents in Pekan Nenas, Johore. According to the petitioner she moved out because of the respondent's adulterous lifestyle. In 1981 the petitioner reconciled with the respondent and she and the child went back to the matrimonial home in Pontian. Their relationship underwent some strain because, according to the petitioner, the respondent went back to his old lifestyle. They also frequently quarrelled during which the petitioner complained of being assaulted by the respondent. In 1984 the petitioner moved back with the child to her parents' home where the child stayed until he was removed by the respondent on 17 July 1987 during a quarrel. The petitioner then instructed her solicitors to file for divorce. The divorce petition has not been heard and in the meantime she made this interlocutory application for custody of the child, maintenance, and injunction against assault by the respondent.

Held, allowing the petitioner's application:

(1) After having considered the totality of the evidence and the submissions of counsel, it was decided that the child must be returned to the mother's custody, the reason being that the child had been cared for by the petitioner for the last nine years before he was forcibly taken away from the petitioner. Both mother and child in those formative years had developed strong bonds. The child must have derived comfort from the closeness of his mother. In caring for the welfare and comfort of the child, she had done it almost single-handedly especially at the time when she did not get any help from the respondent. There was therefore no reason to think she would not be able to do it now.

(2) As to attention to be given to the child, the petitioner is now self-employed and would be staying at home doing her tailoring. The court accepted that the father must be at work much of the time as a used-car salesman. No doubt he had cared for the child for almost two years up to the day of the hearing of this application, but it is not difficult to see from the evidence the constraints he has that work against the interest and welfare of the child. As a salesman, he had to leave the child with a friend to be cared for. It is not difficult to see that this arrangement can never be substituted for the motherly care, love and affection as has been shown by the petitioner.

(3) As for the finance of the respondent, the court found in favour of the petitioner who was earning more than the respondent. The respondent's capacity to finance the child is dependent on his mother's grant of $1,000 per month which would not be given if the child is no longer with the respondent.